Supreme Court, U.S.
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No. 03-

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS GRECO, Individually and as President of Harvey's Lake Amphitheater, Inc.,

Petitioner,

v.

MICHAEL L. BERNBACK,

Respondent.

==========

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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January 2004

QUESTIONS PRESENTED

1. Does Rule 15(b) of the Federal Rules of Civil Procedure permit amendment of pleadings during trial where the issue introduced by the requested amendment "was raised by the pleadings from both sides throughout the course of [the] litigation," as the Third Circuit held below, or must the Rule -- which allows amendments only to cover "issues *not* raised by the pleadings" -- be enforced according to its terms, as several Circuits, including the Fourth and Fifth, have held?

2. Is "undue delay" a factor which must be considered in deciding requests to amend the pleadings pursuant to Federal Civil Rule 15(b) (as in the case of Rule 15(a) requests), as several circuits have held, or may a court ignore the delay factor, as the Third Circuit allows?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties -- petitioner Thomas Greco, individually and as president of Harvey's Lake Amphitheater, Inc. (the defendant in the district court, and appellant below), and respondent Michael L. Bernback (plaintiff-appellee below).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THOMAS GRECO respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit filed July 11, 2003, affirming the district court's judgment entered against petitioner following a civil trial in the Middle District of Pennsylvania.

OPINIONS BELOW

The Third Circuit's memorandum opinion (per Smith, J., with Nygaard, J., and Irenas, Sr. U.S.D.J., D.N.J.)), was filed July 11, 2003. It is published in 69 Fed.Appx. 98 (and available as 2003 WL 21577959); it is reprinted as Appendix A to this Petition. The district court's memorandum and Order denying post-trial motion (A. Richard Caputo, U.S.D.J.), dated May 20, 2002, is not published, but will be found in the Appendix at App. B.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the district court was filed on July 11, 2003. Appendix A. A timely petition for rehearing was denied on August 13, 2003. Appendix C. On November 3, 2003, under No. 03A377, Justice Souter granted an extension of time until January 10, 2004, for the filing of this petition. Since the date authorized by the extension is a Saturday, the petition is being filed pursuant to Rule 30.1. *See also*

Rules 13.1, 13.3, 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall ... be deprived of ... property, without due process of law ...."

The Federal Rules of Civil Procedure provide, in pertinent part:

> **Rule 15. Amended and Supplemental Pleadings**
>
> **(a) Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

> **(b) Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Fed.R.Civ.P. 15.

STATEMENT OF THE CASE

This petition arises out of the Third Circuit's affirmance of the district court's order denying post-trial motions, and thus upholding a judgment in favor of plaintiff-respondent, predicated upon an amendment to the pleadings that was allowed the respondent during trial.

a. The course of proceedings and facts

Petitioner Greco and respondent Michael L. Bernback were shareholders in Harvey's Lake Amphitheater, Inc. ("HLAI"). HLAI was organized in 1992 to construct an outdoor concert venue near Pennsylvania's largest natural lake, located not far from the popular Pocono Mountains ski area. Respondent sued petitioner in 1996 following the failure of the venture. Their business relationship was reflected in three separate documents: a Shareholders' Agreement between petitioner and respondent; a Stock Purchase Agreement between respondent and HLAI; and a Guarantee Agreement, in which petitioner guaranteed HLAI's performance under the Stock Purchase Agreement.

The initial litigation between petitioner and respondent manifested in state court; arbitration proceedings also commenced. However, after the state court enjoined the arbitration process at petitioner's request, respondent filed a diversity action in federal court raising several tort claims such as fraud, intentional interference with contractual relations, and intentional interference with business advantage. Petitioner counterclaimed, seeking return of share certificates related to the Shareholders Agreement; he later filed an amended counterclaim raising fraud, equity and breach of contract claims. The district court dismissed these counterclaims as well as petitioner's subsequent motion for summary judgment. This motion, filed by petitioner's new counsel some two months before trial, alleged among other things that petitioner was "a party to the Stock Purchase Agreement ...." App. A5. Based upon this assertion and its representation as petitioner's allegedly "shifting litigation strategy," *id.*, respondent sought permission to amend his

complaint to include a claim alleging petitioner's breach of contract regarding the Stock Purchase Agreement, which the district court allowed. Despite that court's finding that this claim had "been fairly raised by the pleadings **from both sides** throughout the course of [the] litigation," App. A9 (emphasis added), the requested amendment was not offered anytime prior to trial, but instead was not sought until near the completion of respondent's case in chief. Nonetheless, the district court, only analyzing the matter for prejudice to respondent and never addressing the reasons respondent delayed until trial, permitted the amendment, thus completely transforming a case sounding in tort to one based in contract. Thereafter, the jury found petitioner liable for breach of the contract in question.

Petitioner filed a timely appeal to the United States Court of Appeals for the Third Circuit, which affirmed, finding no abuse of discretion in the trial court's order allowing an amendment of the pleadings. The Third Circuit then denied petitioner's request for rehearing. This timely petition follows.

b. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(i). The United States District Court for the Middle District of Pennsylvania had subject matter jurisdiction under 28 U.S.C. § 1332, given the parties' diversity of citizenship and the amount in controversy. The United States Court of Appeals for the Third Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, following entry of a final judgment in the district court.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with those of other circuits, and ignores the clear language of Federal Civil Rule 15(b), in permitting a party to amend a complaint to conform to the evidence during trial when the subject of that amendment was already "raised by the pleadings."

This Court should grant certiorari to articulate the proper standard for exercise of discretion under Rule 15(b), Fed.R.Civ.P., when a request is made for amendment of a complaint during trial to conform to the evidence. In this case, the courts below accepted the premise that a mid-trial amendment was proper despite also acknowledging that the cause of action implicated in this amendment had been "raised by [the] pleadings from both sides throughout the course of this litigation." App. A9. The wording of Rule 15(b) states that such amendments are allowable "when issues **not raised by the pleadings** are tried by express or implied consent of the parties" (emphasis added).

As recognized by the courts below, the issue implicated in the requested amendment was indeed "raised by the pleadings." For this reason alone, it was not amenable to a Rule 15(b) request. Other circuits have faced similar issues and have rendered entirely different decisions. For example, in *Lucas v. Burnley*, 879 F.2d 1240 (4th Cir. 1989), the court examined the question of Rule 15(b)'s applicability to a situation where the parties had, in their pleading, addressed an issue which was subject of a request for post-verdict amendment. The Fourth Circuit focused on the "plain language" of Rule 15(b).

Since this language "speaks of 'issues **not** raised by the pleadings,'" (emphasis added), the Rule was inapplicable to that case since the question raised by the proposed amendment had already been dealt with in the pretrial pleadings. 879 F.2d at 1242-43.

In an earlier ruling, the Court of Appeals for the Fifth Circuit reached a similar conclusion. Denying a request to amend, that court found that Rule 15(b) was, likewise, limited "by its own terms" and inapplicable to the situation where a "matter was raised" by the pleadings of both sides. *Wirtz v. Savannah Bank & Trust Co.*, 362 F.2d 857, 861 (5th Cir. 1966).

More recently, the principles enunciated in *Wirtz* and *Lucas* found support in a typically thorough and thoughtful decision by Chief Judge Mark Bennett of the United States District Court for the Northern District of Iowa. In *St. Paul Reinsurance Co. v. Commercial Financial Corp.*, 144 F.Supp.2d 1057 (2001), the court examined a request to amend which came during trial of a matter on a written record. Like the Fourth and Fifth Circuits, Chief Judge Bennett refused to allow the amendment, finding that "Rule 15(b) is not applicable" since the issue in question was already addressed by the pleadings of the parties involved. *Id.* at 1063.

In the present case, there was no analysis similar to that applied in the above cited decisions concerning the applicability of Rule 15(b). To the contrary, the lower courts in this matter emphasized the fact that both parties had, in their pleadings, addressed the question raised in the requested amendment as the reason for allowing the amendment. *See* App. A9. In fact, the analysis of Rule 15(b) offered by the court below, focuses primarily on two points: whether the opposing party

(petitioner) consented to the inclusion of the issue, and whether its inclusion would result in prejudice to petitioner. This analysis, however, ignores the "plain language" of the Rule and runs completely contrary to the sound decisions in *St. Paul*, *Wirtz* and *Lucas*, above. In the face of such conflict, it is necessary for this Court to grant the present petition to clarify the proper boundaries of Rule 15(b) and resolve the competing and wholly contrary interpretations which it has evoked.

In a related vein, the First Circuit has recently held that Rule 15(b) cannot be invoked where the trial evidence, while connected to the issue which is subject of the proposed amendment, actually supports a pleaded claim: "But '[t]he introduction of evidence directly relevant to a pleaded issue cannot be the basis for a founded claim that the opposing party should have realized that a new issue was infiltrating the case.'" *Kenda Corp. v. Pot O'Gold Money Leagues, Inc.*, 329 F.3d 216, 232 (1st Cir. 2003), quoting *DCPB, Inc. v. City of Lebanoni*, 957 F.2d 1913, 917 (1st Cir. 1992), and citing *Galindo v. Stoody Co.*, 793 F.2d 1502, 1513 (9th Cir. 1986) ("It is not enough that an issue may be 'inferentially suggested by incidental evidence in the record'; the record must indicate that the parties understood that the evidence was aimed at an unpleaded issue."). In the present case, the trial court granted the request to amend despite acknowledging that the amended claim and the pleaded claims were "'without difference,' and 'virtually the same because it concerns the conduct'" of petitioner. App. B3.

The Third Circuit's decision and the emphasis it places on the question of prejudice has no echo in the trio of cases cited above. Nowhere in *St. Paul*, *Wirtz* or

Lucas is prejudice to the non-moving party cited as a reason for the refusal of those courts to permit the requested amendments. That approach is sound analytically; prejudice is not a threshold question to Rule 15(b)'s applicability but instead is a factor which should be, and is only, addressed after the initial determination is made that Rule 15(b) *prima facie* governs on the facts presented.

The Circuits cited above seem to approach 15(b) questions with much more circumspection than the Third Circuit. They seem to recognize the serious due process issues implicated in granting leave to amend a complaint in what the Rule understands to be a late stage of the proceedings. *See* U.S. Const., amend. V; see also *Deere & Co. v. Johnson*, 271 F.3d 613 (5th Cir. 2001). While it is said that the purpose of Rule 15(b) is "judicial economy" and "saving resources," *Deere, supra,* and that it is "designed to avoid the tyranny of formalism that was a prominent characteristic of the former practice and to avoid the necessity of a new trial," 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1491 (2d ed. 1990), it is also understood that "in the absence of express consent, 'trial of unpled issues by implied consent is not lightly to be inferred under Rule 15(b), [and] such inferences are to be viewed on a case-by-case basis and in light of the notice demands of procedural due process.'" *Deere, supra* (quoting *Jimenez v. Tuna Vessel Granada,* 652 F.2d 415, 422 (5th Cir. 1981)).

Instead, by permitting wholesale leave to amend as was done in his case, the courts below ignored these prudential and constitutional concerns, and invited an overly broad interpretation of the Rule. To prevent this

adverse impact on the fairness of federal civil adjudication, and to bring into uniformity the interpretation of Rule 15(b) in circumstances where the issues have already been pleaded, this petition should be granted and a writ of certiorari issued.

2. The failure of the Third Circuit to consider "undue delay" as a reason for denying leave to amend under Federal Civil Rule 15(b) conflicts with the decisions of other circuits and adds to the confusion as to the applicability of Rule 15(a) criteria in Rule 15(b) situations.

While Rules 15(a) and (b) of the Federal Rules of Civil Procedure address strikingly different circumstances relative to the amendment of pleadings,[1] the confusion over the application of their respective criteria has created a patchwork of principles in the various circuits, calling for resolution by this Court through grant of the present petition.

For example, in the present case, respondent was made aware of the basis for his motion to amend from the pleadings of himself and petitioner, and as noted by the Third Circuit, by the summary judgment motion of petitioner at least two months prior to trial. App. A5, 9-10. No explanation appears as to why respondent did not file his request to amend pursuant to Rule 15(a) after reviewing the pleadings, or at least within the two months prior to trial after petitioner had filed his summary judgment motion. Instead, the parties commenced trial

[1] The full text of these subsections of Rule 15 appears in the Constitutional Provision and Rule Involved, *ante*.

on issues sounding in tort, only to have respondent seek and obtain leave to change theories near the end of his case in chief, transforming the trial into one rooted in contract. App. A5, A9.

A Rule 15(a) request in this case would have been subject to examination pursuant to the multi-pronged test applicable to such questions. In *Foman v. Davis*, 371 U.S. 178 (1962), while recognizing Rule 15(a)'s liberal nature, and that under that subsection "leave to amend 'shall be freely given when justice so requires'," *id.* at 182 (quoting Rule 15(a)), this Court outlined the criteria by which a court may decline to grant leave, which include concerns:

> such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.

371 U.S. at 182. This approach is consistent with the preferential place Rule 15(a) has in the realm of amendment of pleadings. *See, e.g.,* Wright, *supra* ("it is always preferable to move under Rule 15(a) to amend the pleadings before trial"), thus limiting the negative impact a party's delay may have on the proceedings, and suggesting that Rule 15(b) is quite the exception and not the general "rule."

But while application of an "undue delay" test to Rule 15(a) requests has been promoted by this Court, the same cannot be said for delay in the 15(b) context. Instead, without guidance from this Court, a variety of protocols have developed among the several circuits, resulting in different approaches to the question of delay

in Rule 15(b) cases. Some courts have expressed noted discomfort over such delay, while at the same time surrendering to its irrelevance in application of 15(b). See *Pomer v. Schoolman*, 875 F.2d 1262, 1268-69 (7th Cir. 1989) (per Posner, J.: holding, upon consideration of a Rule 15(b) request, that although not untimely, "[t]he close of evidence is awfully late in a lawsuit to move for an amendment to the complaint," *id.* 1268). Others have inferred that a presumptive prejudice arises from undue delay in Rule 15(b) cases. See *St. Paul*, 144 F.Supp.2d at 1067 (late amendment under 15(b) "would undoubtably result in substantial prejudice"); see also *Fisher v. Vassar College*, 70 F.3d 1420, 1449 (2d Cir. 1995) ("Ordinarily, the assertion of a new claim for liability [in a Rule 15(b) amendment] on the last day of trial will be prejudicial.").

An array of other courts have merely confused the applicable rules governing 15(a) and (b) requests, and through their misinterpretation have intertwined these criteria one for the other. See, *e.g.*, *Colmenares Vivas v. Sun Alliance Ins. Co.*, 807 F.2d 1102, 1108 (1st Cir. 1986), and *Browning v. Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977) (each applying the Rule 15(a) criteria outlined in *Foman, supra*, to a question arising under Rule 15(b)); see also *Consolidated Data Terminals v. Applied Digital Data Systems, Inc.*, 708 F.2d 385, 395-97 (9th Cir. 1983) (analyzing a Rule 15(b) question through application of 15(a) principles announced in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971)).

Most telling are those courts which have carved out a "delay" prong applicable to 15(b) cases, to stand alone from any other criteria in determining whether the requested amendment should be allowed. For example,

in *United States v. Davis*, 261 F.3d 1 (1st Cir. 2001), addressing the question of a late request under 15(b) to amend a complaint "to conform to the evidence offered at trial," the First Circuit held that the issue of prejudice to the non-moving party is not the sole, or even a necessary criteria for denial of such a late amendment: "We consider prejudice to the non-moving party as one factor to be weighed in permitting an untimely amendment to the pleadings. ... In other words, a finding that the non-moving party would not be prejudiced by an untimely amendment does not compel a determination that the amendment is appropriate." *Id.* at 59.[2]

A result similar to that in the First Circuit's *Davis* case was reached in *Jenkins v. Union Pacific R.R.*, 22 F.3d 206 (9th Cir. 1994). In *Jenkins*, the Ninth Circuit

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[2] Although the lower courts found that petitioner in this case was not prejudiced by the allowed amendment, in fact, he was. For example, the lower courts found that petitioner's "own legal theories and strategies" formed the basis for the amendment given the assertion in the pleadings and summary judgment motion that petitioner was party to the contract. *See* App. A7-A8. The lower court recognized that petitioner was a party to a Personal Guarantee agreement which granted respondent the option, in the event of default, to "pursue all of its remedies thereunder against HLAI alone, or against [petitioner] and HLAI concurrently." App. A7. What the lower court failed to recognize, however, was that this Agreement did **not** allow respondent to proceed in a breach action against petitioner **alone**, but only in conjunction with HLAI. Once it granted the requested amendment, the failure of the court to join HLAI as an indispensable party pursuant to Fed.R.Civ.P. 19, so that defenses unique to its status could be raised, constituted a manifest prejudice to petitioner and worked to his detriment at trial.

determined that since the moving party was aware of the facts upon which it was basing its mid-trial request to amend, denial of the motion was appropriate. The court recognized that the trial court had considered the issue of prejudice, but allowed for a separation of this criteria from the issue of "delay" and affirmed the lower court's rejection of the amendment. *Id.* at 212-13.

What is striking about *Jenkins* and *Davis* is not just how they extract a "delay" test applicable not only to 15(a) cases, but to 15(b) cases as well, and how they sever this test from any direct consideration of "prejudice" to the non-moving party. Application of that approach in the present case may have resulted in denial of the requested amendment, or at the very least, inquiry as to why respondent failed to move earlier to amend his complaint. Such a denial, or at least an inquiry, would have served to protect the same due process concerns cited in Reason 1, above.

Whether "delay" in seeking a Rule 15(b) amendment is governed by the *Jenkins-Davis* standard, or the *Pomer-Fisher-St. Paul* criteria mentioned above, uniformity in this context is vital. For this Court to defer the opportunity to resolve these important questions of civil procedure, which are now dangerously fluid in the lower courts, would render the details of the Rules in question meaningless, and allow further development of a quilted set of trial rules from circuit to circuit; making orderly litigation in a national court system impossible.

CONCLUSION

For the foregoing reasons, petitioner THOMAS GRECO, individually and as president of Harvey's Lake Amphitheater, Inc., prays that this Court grant his petition for a writ of certiorari, vacate the judgment below, and remand this case to the United States Court of Appeals for the Third Circuit with instructions to remand to the district court for new trial.

Respectfully submitted,

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January 12, 2004

APPENDIX A

69 Fed.Appx. 98

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2742

MICHAEL L. BERNBACK,

v.

*** THOMAS GRECO, individually and as President of Harvey's Lake Amphitheater, Inc.; Thomas Greco, Appellant**

***99** On Appeal from the United States District Court
for the Middle District of Pennsylvania
(Civ. No. 98-cv-00230),
Honorable A. Richard Caputo, District Judge

Submitted Under Third Circuit L.A.R. 34.1(a)
July 10, 2003
BEFORE: NYGAARD, SMITH, Circuit Judges, and
IRENAS,** District Judge
(Filed July 11, 2003)

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* Amended as per the Clerk's 9/5/02 Order.

** Honorable Joseph E. Irenas, Senior United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

SMITH, Circuit Judge.

I. FACTS AND PROCEDURAL HISTORY

A. History of the Litigation

**1 Michael Leslie Bernback and Thomas Greco have long and complicated history of business dealings, primarily in the concert promotion business. Their relationship deteriorated over time into a tangle of litigation in the state and federal courts. In April 1996, Bernback filed a demand for arbitration against Greco, "Individually and as President of Harvey's Lake Amphitheater," pursuant to a "Stock Purchase Agreement" that contained an arbitration clause. The nature of the dispute was characterized as "Breach of Contract and Fiduciary Duty":

> Claimant [Bernback] and Respondent [Greco] entered into a Stock Purchase Agreement, wherein each became equal shareholders in a corporation, and Respondent, in violation of the agreement, and in breach of fiduciary duties, usurped the powers granted him by the agreement, effectively shutting Claimant out of the corporation to the financial detriment of claimant.

Greco responded to the demand for arbitration by filing an equity action in state court seeking return of certain "share certificates." In his original complaint, Greco asserted that both he and Bernback were officers, directors, and shareholders in Harvey's Lake Amphitheater, Inc., a Pennsylvania Corporation. Greco claimed that, in May 1995, Bernback had forfeited his

shares to Greco, but had refused to turn them over to Greco. Greco sued to obtain physical possession of the shares and sought a declaration that Greco "is the owner of all of the stock in the Harvey's Lake Amphitheater, Inc., that was previously owned by" Bernback.

Greco then filed an amended complaint in equity, alleging that he and Bernback had entered into a "Shareholder's Agreement" with Harvey's Lake Amphitheater on May 21, 1993, in which Bernback pledged his stock in Harvey's to Greco, "and agreed that if [Bernback] was in breach of the provisions of the Agreement, [Greco] is entitled to immediate possession and ownership of all of the stock of Harvey's Lake Amphitheater, Inc., then owned by [Bernback]." In Greco's view, Bernback breached Paragraph 14 of the Agreement, ***100** entitling Greco to immediate possession of the stock certificates.

Bernback contends that Greco's action in equity was merely an attempt to derail the arbitration proceedings. As part of his equity action, Greco moved to stay the arbitration proceeding, on the ground that "the dispute among the parties does not arise under th[e] Stock Purchase Agreement," as alleged by Bernback in the demand for arbitration. Rather, Greco argued, the dispute arose over whether Bernback forfeited his shares under the Shareholders' Agreement, and therefore could not be arbitrated under the Stock Purchase Agreement. The Court of Common Pleas granted a preliminary injunction to enjoin the arbitration proceedings. The Court reasoned that the only parties to the Stock Purchase Agreement were "Harvey's Lake Amphitheater, Inc." and Michael Leslie Bernback. Because Greco was not a party to the Stock Purchase Agreement, there was no agreement to arbitrate between Bernback and Greco.

**2 In February 1998, Bernback filed an action in federal court for fraud, intentional interference with contractual relations, and intentional interference with business advantage. While acknowledging that his action sounded in tort, Bernback contended that it was based "on the contracts between these two men." Because of Greco's successful argument before the state court that he was not a party to the contract, Bernback contended that he had to sue under an interference with contract theory rather than a breach of contract theory. Bernback's complaint referred not only to the Stock Purchase Agreement, but also to another contract, the "Personal Guarantee, Hold Harmless and Assignment Agreement," which was entered on the same day, by Greco personally, in contemplation of further business dealings between the two men.

Greco counterclaimed, seeking return of his share certificates and attaching a copy of the May 21, 1993 Shareholders Agreement. In June of 1998, Greco filed an amended counterclaim, alleging not only counts in equity and fraud, but also breach of contract. Greco alleged that Bernback breached both the Stock Purchase Agreement and the Shareholder's Agreement. The Court ultimately dismissed Greco's Breach of Contract claim based on the fact that Greco was not a party to the Stock Purchase Agreement. Bernback thus contends that

> in the earliest stages of this litigation, all three of the primary contracts between these two men were on the table for all to see. Couched as it may have been in the name of a tort, the nature of this action was and always has been one centered on the agreements that these two men made between themselves.

Although Greco had contended that he was not a party to the Stock Purchase Agreement, in August of 2000, he retained new counsel and for the first time argued in a summary judgment motion that "the Stock Purchase Agreement literally incorporates the Shareholder[] Agreement, to which Greco is a party, thereby making Greco a party to the Stock Purchase Agreement, as well." Bernback thus maintains that, two months before trial, Greco completely changed his legal strategy. By arguing that he was a party to the Stock Purchase Agreement, Greco was able to contend that, as a matter of law, he could not have interfered with that contract.[1]

***101** In response to Greco's shifting litigation strategy, Bernback sought to amend his complaint, during trial, to include two additional counts: (1) breach of contract as to the Stock Purchase Agreement; and (2) breach of contract as to the Shareholder Agreement. The District Court permitted him to add an amendment regarding the Stock Purchase Agreement, but refused to allow the other proposed cause of action.

Following trial, the jury returned a verdict in favor of Bernback for breach of the Stock Purchase Agreement in the amount of $225,000. The District Court denied Greco's post trial motion for judgment as a matter of law and awarded Bernback attorney fees and costs in the

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[1] By definition, the tort of interference with contract under Pennsylvania law requires that a defendant interfere with contracts which exist or will exist between the plaintiff and third parties. A party to the contract itself cannot be the tortfeasor. *Daniel Adams Assoc., Inc. v. Rimbach Publishing, Inc.*, 360 Pa.Super. 72, 78-79, 519 A.2d 997 (1987).

amount of $162,748.62. Greco then filed the instant appeal.

B. The Relevant Agreements

**3 The Stock Purchase Agreement is dated May 21, 1993 and the parties are Harvey's Lake Amphitheater, Inc. and Michael Leslie Bernback. Thomas Greco was the sole shareholder and owner of Harvey's Lake Amphitheater. Pursuant to the Stock Purchase Agreement, Bernback acquired a 50% interest in Harvey's Lake Amphitheater, subject to certain conditions. In essence, the Stock Purchase Agreement provided that Bernback would become Greco's partner in Harvey's Lake Amphitheater, Inc., on the condition that Bernback negotiated and paid off certain items of debt, up to $125,000. The Agreement was signed by Thomas Greco, in his capacity as President of Harvey's Lake.

The Personal Guarantee, Hold Harmless and Assignment Agreement was entered into on May 21, 1993, "by and between THOMAS J. GRECO ('GRECO') and MICHAEL LESLIE, also known as MICHAEL LESLIE BERNBACK ('LESLIE')." The Guaranty states that "concurrent with the execution of this Agreement, MICHAEL LESLIE is, in reliance upon GRECO's execution hereof, entering into a written Stock Purchase Agreement dated May 21, 1993 ... with HARVEY'S LAKE AMPHITHEATER, INC." Further, it makes execution of the Guaranty a condition precedent "to the closing of the transaction contemplated by the Stock Purchase Agreement." True to its name, the Personal Guarantee contains a personal guarantee by Greco regarding all obligations, promises, and represen-

tations in the Stock Purchase Agreement, and also states that "Greco is therefore personally subject to and liable for all remedies available to LESLIE" under the Stock Purchase Agreement. The document also states that

> In the event of any default, failure of consideration, misrepresentation, adverse change in circumstances relating to representations, or breach of contract or warranty by HLAI [Harvey's Lake Amphitheater, Inc.] in connection with the Stock Purchase Agreement, LESLIE may pursue all of its remedies thereunder directly against HLAI alone, or, against GRECO and HLAI concurrently.

The Shareholder Agreement was also entered into on May 21, 1993, by Thomas Greco, Michael Leslie [Bernback], and Harvey's Lake Amphitheater. Like the Stock Purchase Agreement, this agreement also contained an arbitration clause.

II. JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1332(a)(1). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

III. ANALYSIS

A. Amendment of the complaint

Greco first complains that the District Court erred in permitting Bernback to ***102** amend his complaint during trial to add a breach of contract claim. Bernback argues that the District Court did not commit reversible error, because: (1) Greco was on notice from the litigation's inception that Bernback's action was based on contract principles; (2) Greco's own legal theories and

strategies created the need for the amendment; and (3) Greco was not prejudiced by the amendment.

We review the District Court's grant of leave to amend a complaint for abuse of discretion. *Douglas v. Owens,* 50 F.3d 1226, 1235 (3d Cir. 1995). Federal Rule of Civil Procedure 15(b) provides that parties may amend a pleading to conform to the evidence

> **4when issues not raised by the pleadings are tried by express or implied consent of the parties .... Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment .... If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits.

Fed.R.Civ.P. 15(b). Whether an issue was tried by "implied consent" of the parties depends on "whether the parties recognized that the unpleaded issue entered the case at trial, whether the evidence that supports the unpleaded issue was introduced at trial without objection, and whether a finding of trial by consent prejudiced the opposing party's opportunity to respond." *Douglas,* 50 F.3d at 1236. In the instant case, the parties certainly recognized that the unpleaded issue entered the case at

trial, because Bernback moved to amend the complaint during his case in chief, the District Court heard argument, and ruled on the motion before Greco presented his case.

We agree with the District Court that Greco was not prejudiced by the amendment. The District Court correctly determined that the breach of contract claim had been raised, "not only by the evidence, but it's been fairly raised by the pleadings from both sides throughout the course of this litigation."

Greco was clearly on notice regarding the existence of the contracts and the possibility of an action based on breach of contract. In his opening, Greco's counsel discussed both the Stock Purchase Agreement and the Shareholders Agreement, noting that Greco's and Bernback's "relationship is indeed founded in contract, in agreements that they made between themselves." He went on to say that Bernback's wrongful interference with contract theory "isn't really supposed to turn contract disputes into tort damages actions, which is really what's happening." During Bernback's case in chief, counsel admitted into evidence copies of both the Stock Purchase Agreement and Personal Guarantee, as well as the Shareholders Agreement.

Furthermore, Greco's inconsistent positions as to whether he was or was not a party to the Stock Purchase Agreement created the need for Bernback to move to amend his complaint to assert a breach of contract claim. In state court, Greco successfully argued that he was not a party to the contract. In federal court, Greco denied being a party to the Stock Purchase Agreement in his Amended Answer filed May 7, 1998, but in his June 1998 Amended Counterclaim, alleged that Bernback

"breached the Stock Purchase Agreement." *103 On December 10, 1998, the District Court dismissed Greco's counterclaim because Greco was not a party to that agreement.[2] Then, two months before trial, in August 2000, Greco retained new counsel and argued that he was a party to the Stock Purchase Agreement.

**5 Greco asserts on appeal that he was prejudiced by the amendment because it affected his witness selection. We are not persuaded by this argument, given that the witnesses Greco alleged he would have called in a breach of contract case were listed not only in his initial disclosures, but also in his pre-trial witness list. Because the Court decided the motion to amend prior to Greco's case in chief, he was not precluded from calling any witness he chose. In conclusion, we are satisfied that the District Court did not abuse its discretion in permitting Bernback to amend his complaint to include a breach of contract claim.

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[2] We agree with Bernback that Judge Caputo's decision to grant leave to Bernback to amend his action to include breach of the Stock Purchase Agreement was not inconsistent with his December 10, 1998 dismissal of Greco's counterclaim. Under the Personal Guarantee, Hold Harmless and Assignment Agreement, Greco personally guaranteed performance of all of the promises, obligations, and terms set forth in the Stock Purchase Agreement, and pledged to be liable for all remedies available to Bernback under the Stock Purchase Agreement. Because he undertook this personal guarantee, Greco cannot now argue that he was not on notice of the possibility that Bernback would file a breach of contract suit under the Personal Guarantee based on the terms of the Stock Purchase Agreement.

B. Sufficiency of the evidence

Greco filed a motion for judgment as a matter of law following the jury verdict in Bernback's favor. The District Court denied Greco's motion. We exercise plenary review of a district court's grant or denial of a motion for judgment as a matter of law. *Walter v. Holiday Inns, Inc.*, 985 F.2d 1232, 1238 (3d Cir. 1993). Reversal of a jury verdict is only appropriate if, "viewing all the evidence which has been tendered and should have been admitted in the light most favorable to the party opposing the motion, no jury could decide in that party's favor." *Id.* at 1238.

Although the parties were not helpful in pointing to the relevant parts of the record, there is sufficient evidence for a rational juror to find that Greco breached the Stock Purchase Agreement. With respect to Harvey's Lake's loss of the business opportunity with Metropolitan Entertainment Co., Greco testified that he entered into discussions with a company called Metropolitan regarding a possible agreement between Harvey's Lake and Metropolitan, whereby Harvey's Lake Amphitheater would close, shows scheduled to take place there would move to a venue called Montage, and Greco and Bernback would receive 17% of the profits from those shows. However, Metropolitan ultimately decided that it did not wish to go through with the Agreement, based largely on actions by Greco.

Bernback's counsel read into the record at trial the deposition of James Koplik, the President of Metropolitan. Koplik testified that the relationship between Metropolitan and Harvey's lake dissolved as a result of actions by Greco, including his having gotten into a fight with a police officer at a concert, accepting advertising

money when he was not actually putting on shows at a venue, and other problems. Koplik testified that Metropolitan's decision to end its relationship with Harvey's Lake had nothing to do with Bernback.

Counsel for Bernback introduced correspondence between Greco and Bernback, ***104** in which Greco admitted that he had made misrepresentations to Metropolitan during the course of negotiations, including indicating to them that he was personally liable on a lease when he was not. Counsel also introduced testimony by Shirley Hanson that Greco had intentionally altered a lease agreement. Greco had also, contrary to his promises, opened Harvey's Lake during the summer of 1994 and told the media that he intended to open it during the summer of 1995.

****6** The foregoing evidence was sufficient for a rational juror to find that Greco breached Section 6.21 of the Stock Purchase Agreement, which requires Greco to refrain from action that would compromise Harvey's Lake's ability to achieve the highest level of profitability.

C. Jury Instructions

Where, as here, the District Court has not misstated the applicable law, we review its charge to the jury for abuse of discretion. *Greenleaf v. Garlock*, 174 F.3d 352, 361 (3d Cir. 1999). Greco challenges the District Court's instructions regarding breach of contract. Bernback suggests that most of what Greco submitted as proposed points for charge was included in the actual instructions. Indeed, the District Court reminded the jury that Bernback bore the burden of proof, and also gave the jury Greco's proposed instructions regarding trivial non-performance and acquiescence by Bernback.

Greco's first attack on the jury instructions is that the District Court erred in instructing the jury that "whether [Bernback] is or is not a shareholder should not be a basis in whole or in part for any findings you arrive at in your deliberations in this case." Bernback argues that this instruction could not have come as a surprise to Greco, because the District Court had made a pre-trial ruling on Greco's Motion for Expedited Separate Trial concerning Bernback's status as a shareholder. Greco requested that the jury be told that Bernback was not a shareholder as a matter of law, which would have been improper. Bernback's shareholder status was irrelevant to whether or not Greco breached the Stock Purchase Agreement. Thus, the District Court did not abuse its discretion in denying this requested instruction.

Greco's second specific complaint about the jury instructions is that the District Court prejudiced Greco by directing the jury's attention to certain provisions of the Stock Purchase Agreement. At the charge conference, the District Court stated to counsel that there were two sets of circumstances that might have given rise to a breach of contract: (1) the loss of the Montage or Metropolitan involvement, and (2) the question of the operation of HLAI with respect to its funds, and whether funds were misapplied in terms of being used for purposes other than those of the corporation. The District Court then directed the jury to consider the specific sections of the contract.

We agree with Bernback that the District Court's instructions drawing the jury's attention to particular contractual provisions were not improper, given that it was still within the province of the jury to determine whether Greco did or did not breach those provisions. In

addition, Greco's counsel did not object when the Court informed the parties, prior to charging the jury, that he intended to mention particular contractual provisions. Even if the District Court's instructions regarding specific provisions of the contract were erroneous, we can affirm the jury verdict in Bernback's favor if those errors were harmless. *Pivirotto v. Innovative Systems, Inc.*, 191 F.3d 344, 357 (3d Cir. 1999). Any error here would have been harmless ***105** because, "in light of the total record here, we are satisfied that no jury would have found" for Bernback "solely on the basis of the [erroneous] instruction." *Id.* We conclude that the District Court's jury instructions were fully consistent with the sound exercise of judicial discretion.

D. Damages

****7** The jury awarded Bernback $225,000 in damages for Greco's breach of the Stock Purchase Agreement. We are satisfied that a rational juror could have concluded that these damages flowed from Greco's breach of the Stock Purchase Agreement through the Personal Guarantee.

E. Attorney Fees and Costs

As the prevailing party, Bernback asserted that he was due $287,050 in attorney's fees and $69,470.87 in expenses, pursuant to the Stock Purchase Agreement and the Personal Guarantee. Bernback argues the contracts between Bernback and Greco clearly contained fee shifting provisions that allowed for an award of attorneys' fees and costs to the prevailing party.

The District Court looked to two contract provisions that supported the award of attorney's fees. Section

13.13 of the Stock Purchase Agreement provides that "if any action at law or equity is brought to enforce or interpret this Agreement, the prevailing party therein shall be entitled to recover from the other party the actual attorney's fees incurred, court costs, and other litigation-related expenses." The Personal Guarantee provided for attorney's fees and costs in almost identical language.

Nonetheless, Bernback entered into a fee agreement with counsel providing that Bernback's attorney's fees are limited to 40% of the jury verdict. Since the jury verdict was $225,000, the Court awarded Bernback $90,000 in fees. The District Court did not err in conforming the fee award to the fee agreement between Bernback and his counsel.

With respect to Bernback's claimed expenses of $69,470.87, which covered fax, photocopying, telephone, investigation, and travel expenses, we agree with the District Court that these were reasonable.

IV. CONCLUSION

For the foregoing reasons, the judgment of the District Court will be affirmed.

APPENDIX B

I(279) 5/20/02 TS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL L. BERNBACK,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	NO. 3:CV-98-230
THOMAS GRECO, Individually and as President of Harvey's	:	(JUDGE CAPUTO)
Lake Amphitheater, Inc.,	:	
Defendant.	:	

FILED
SCRANTON
MAY 20 2002
PER /km
DEPUTY CLERK

MEMORANDUM

Presently before me is Plaintiff Michael L. Bernback's motion for attorney's fees from Defendant Thomas Greco (Doc. 239) and Defendant's motion for judgment after trial, or alternatively, for a new trial. (Doc. 241.)

Plaintiff brought this action on February 11, 1998, alleging claims for: (1) fraud; (2) intentional interference with contractual relations; and (3) intentional interference with prospective business advantage. During the trial, he amended his complaint to include a breach of contract claim. On November 3, 2000, following a two (2) week trial, the jury found that Defendant had breached the stock purchase agreement and awarded Plaintiff $225,000. (See Jury Verdict Form, Doc. 232.)

Defendant moved for judgment after trial, or alternatively, for a new trial, arguing, *inter alia*, that: (1) Plaintiff lacked standing to recover individually for harm alleged to have been incurred directly by a corporation of which Plaintiff was merely a shareholder; (2) the Court erred in permitting Plaintiff to amend his complaint on the fourth day of trial to include a claim for breach of contract, after Plaintiff had already presented his evidence [2] at trial; (3) on the facts as asserted by Plaintiff, no breach of contract could reasonably be found, and (4) the Court erred in instructing the jury, as a matter of law, that Plaintiff was a rightful shareholder where there was a dispute on this issue, and Defendant had submitted substantial opposing evidence. (Doc. 241.)

As the prevailing party, Plaintiff now seeks a total of $287,050 in attorney's fees and $69,470.87 in expenses, pursuant to the Stock Purchase Agreement and the Personal Guarantee. (Doc. 239, Exs. A, B.)

DISCUSSION

A. Defendants Motion for Judgment After Trial, Or For A New Trial

1. Judgment After Trial

Defendant moves for judgment after trial, or alternatively, for a new trial. (Doc. 241.) I find that Defendant's arguments have been addressed and are without merit. The standard for judgment after trial is "whether the evidence is such that, without weighing the credibility of the witnesses, or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached." *Sunblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970). In addition, the evidence should be viewed in the light most favorable to the party against whom the

motion is made, in this case, Plaintiff. *Kinnel v. Mid-Atlantic Mausoleums*, 850 F.2d 958 (3d Cir. 1988).

Viewing the evidence in the light most favorable to Plaintiff, I cannot find that a reasonable person could only have reached a verdict in favor of Defendant. Applying the foregoing standard here dictates denial of Defendant's motion. At the close of the [3] evidence, I denied Defendant's motion for judgment as a matter of law because I could not find that Plaintiff failed to present any evidence to support his allegations. Nothing has changed since then.

The Court permitted Plaintiff to amend his pleading because this case arises out of business dealings between Plaintiff and Defendant, specifically the contract entered into by the parties. The parties argued this was a breach of contract case at trial, both repeatedly referring to the "agreement." This case was always one dealing with the terms of the agreement. Therefore, it was not an error of law to allow Plaintiff to amend his complaint to include a breach of contract claim. It is within the Court's discretion to allow parties to amend their pleadings. Defendant has not illustrated any prejudice in allowing Plaintiff to amend his action to one of breach of contract as opposed to tortious interference with contract. As I previously determined, the distinction between a tort for interference with contract and a breach of contract is "without difference," and "virtually the same because it concerns the conduct" of Defendant. I determined there was no prejudice then, and there is still no prejudice.

Defendant has not shown that there was an error in the Court's refusal to give certain jury instructions, which in essence were just redundant of the instructions the

Court had already given. The Court finds that there was no error in the jury instructions to merit judgment after trial. Finally, the Court has already considered Plaintiff's standing as a shareholder. The Court determined that it was not a threshold issue to Plaintiff's claims, and instructed the jury accordingly. As it was irrelevant to Plaintiff's claims, it had no impact on the jury verdict. Simply put, Defendant has failed to meet the standards for [4] judgment after trial.

2. New Trial

Defendant moves for a new trial under Rule 59(a) of the Federal Rules of Civil Procedure. Rule 59(a) provides, in part, that "[a] new trial may be granted ... to any of the parties and on all or part of the issues (1) in an action where there has been a trial by jury." Fed. R. Civ. P. 59(a). Local Rule 7.23 provides that a motion for a new trial must state with particularity any trial errors alleged as grounds for a new trial. It is clearly understood that there may be a new trial on some elements of liability, e.g. *Coleman Motor Co. v. Chipler Motors Corp.*, 525 F.2d 1338 (3d Cir. 1975). *See also* 11 Charles Alan Wright, et al., Federal Practice and Procedure § 2814 (2d ed. 1995). In order to grant a partial new trial, the trial court must find that the issue to be retried is "distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500-01, 51 S.Ct. 513, 515 (1931) (citations omitted).

In the Third Circuit, a district court reviewing a jury verdict has an "obligation ... to uphold the jury's award if there exists a reasonable basis to do so." *Motter v. Everest & Jennings, Inc.*, 883 F.2d 1223, 1230 (3d Cir. 1989). Moreover, in evaluating a party's entitlement to new trial

following the jury's verdict, the district court must view evidence and inferences reasonably drawn therefrom in the light most favorable to the party with the verdict. *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1273 (3d Cir. 1979).

In evaluating whether to exercise its discretion to grant or deny a motion for a new [5] trial, district court must consider on what basis litigant seeks new trial. If the party is alleging a trial error, as Defendant is, the court must first determine whether an error was made in the course of trial, and then must determine whether that error was so prejudicial that refusal to grant a new trial would be inconsistent with substantial justice. *Rutter v. Rivera*, 191 F.Supp.2d 584, 587 (E.D.Pa. 2002) (citing *Lyles v. Allstate Insurance Company*, No 00-628, 2000 WL 1868389 (E.D.Pa. 2000)). If the court has committed a prejudicial error of law, it has wide discretion to require a new trial to correct that error. *Klein v. Hollings*, 992 F.2d 1285, 1289-90 (3d Cir. 1993). However, I have already considered Defendant's alleged errors, and found them to be without merit.

Defendant also argues that the verdict was against the weight of the evidence. A district court should only grant a new trial on the basis that the verdict was against the weight of the evidence where a miscarriage of justice would result if the verdict were to stand. *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1076 (3d Cir. 1996). I am unconvinced that upholding the jury's verdict would result in a miscarriage of justice. Moreover, again, the Court considered and rejected Defendant's claim that no breach of contract could reasonably be found on the facts alleged by Plaintiff when Defendant moved for judgment as a matter of law. Accordingly, the Defendant has failed to meet the standard to grant a new trial.

B. Plaintiff's Motion for Attorney's Fees and Expenses

Defendant argues that any award of attorney's fees and expenses should await the outcome of their motion for judgment after trial, or alternatively, for a new trial and any appeal. The Court has already discussed their motion for judgment after trial, or **[6]** alternatively, for a new trial. Moreover, a district court has the discretion to consider an application for attorneys fees while an appeal is pending. *See Local Union No. 1992 of the Int'l Brotherhood of Electrical Workers. v. Okonite Co.*, 34 F.Supp.2d 230, 234 (D.N.J. 1998) (citing *West v. Keve*, 721 F.2d 91, 95 n.5 (3d Cir. 1983)). Therefore, I find that Plaintiff's motion for attorney's fees and expenses is timely and may be considered at this time.

In this case, there are two (2) documents which entitle Plaintiff to attorney's fees. First, the Stock Purchase Agreement provides:

> 13.13 Attorney's Fees and Court Costs. If any action at law or equity is brought to enforce or interpret this Agreement, the prevailing party therein shall be entitled to recover from the other party the actual attorney's fees incurred, court costs, and other litigation-related expenses.

(Stock Purchase Agreement, Doc. 239, Ex. A.)

There was also a Personal Guarantee, which provides:

> If any action at law or equity is brought to enforce or interpret this Agreement, the prevailing party therein shall be entitled to recover from the other party the actual attorney's fees incurred, court costs and all other litigation-related expenses.

(Personal Guarantee, Doc. 239, Ex. B.) A district court may award attorneys fees and costs for post-judgment proceedings that are "useful" and of a type "ordinarily necessary" to secure the litigation's final result. *See Stewart v. Gates*, 987 F.2d 1450, 1452 (9th Cir. 1993) (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 557-61, 106 S.Ct. 3088 (1986)).

1. Attorney's Fees

Generally, the starting point for a court determination of reasonable attorney's [7] fees is the lodestar calculation, which entails multiplying the number of hours reasonably expended by each attorney by a reasonable hourly rate. *See Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933 (1983).

In this case, lead counsel Richard C. Angino claims 179.9 hours, charging $500 an hour, for $89,950 in attorney's fees, and his associate James DeCinti claims 788.40 hours, billed out at $250 an hour, for $197,100, a total of $287,050 in attorneys fees. Both claims are supported by affidavits. (*See* Angino Aff., Doc. 239, Ex. D; DeCinti Aff., Doc. 239, Ex. E.)

Defendant makes a number of objections to these figures: (1) they filed a motion for judgment after trial, or alternatively, for a new trial, and that until the Court decides on these motions, Plaintiff is not a "prevailing" party; (2) Defendant prevailed on Plaintiff's claims as filed and pursued in the action for tortious interference, fraud, and punitive damages; (3) Plaintiff originally agreed to attorney's fees based on a forty percent (40%) contingency; (4) the agreement discusses "actual" costs, and Plaintiff has not paid the firm, so these are not "actual" costs; (5) much of the work claimed by Angino

and DeCinti is for other advice and other litigation, such as an arbitration proceeding and previous state court lawsuits; (6) the $500 hourly rate that Angina is claiming is excessive and unreasonable, and out of line with the rate charged for similar cases in the community; and (7) the register does not reflect the actual expenses attributable to the prosecution of this action, since much of it is incident to this action, contains unexplained photocopying or fax charges that seem excessive, or includes expenses incurred before the federal action was even filed on February 11, 1998.

[8]I have reviewed the briefs and I presided at the hearing. As a preliminary matter, Defendant's pending motion for judgment after trial, or alternatively, for a new trial, has been decided, and Plaintiff is a prevailing party. The Court is not concerned that the Stock Purchase Agreement and Personal Guarantee discuss "actual costs." The attorney's fees are the actual costs that Plaintiff incurred in this action, whether he has had opportunity to pay them or not. It does not make the fees any less "actual." Finally, Defendant's claim that much of the work was done prior to the action being commenced in federal court is meritless. I find that it is natural that Plaintiff would have incurred expenses before the action would have been filed in preparation for drafting the complaint and such. All of the expenses were incurred after he retained counsel, and Defendant has not illustrated that they were not related to the preparation of filing the lawsuit.

The starting point for a court's determination of reasonable attorney's fees is the lodestar calculation, which entails multiplying the number of hours reasonably expended by each attorney by a reasonable houily rate.

See Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933 (1983). The party seeking fees has the initial burden of presenting evidence that the claimed rates and amounts of time are reasonable. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564, 106 S.Ct. 3088 (1986). Once the fee applicant has made this Initial showing, "the resulting product is presumed to be the reasonable fee to which counsel is entitled." *Id.* (quoting *Blum v. Stenson*, 465 U.S. 886, 897, 104 S.Ct. 1541 (1984)). The opposing party then has the burden of making specific objections to the proposed fee by affidavit or brief. *See Rode* [9] *v. Dellarciprete*, 892 F 2d 1177, 1183 (3d Cir 1990). In considering the opposing party's objections, the district court has significant discretion to adjust the lodestar downwards. *Id.*

The first step in the lodestar calculation is the determination of the number of hours reasonably expended. The court begins with the claimed hours for which the applicant has evidentiary support, and then makes deductions, if necessary, as follows:

> The district court should exclude hours that are not reasonably expended. Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Further, the court can reduce the hours claimed by the number of hours "spent litigating claims on which the party did not succeed and that were 'distinct in all respects from' claims on which the party did succeed." *Institutionalized Juveniles [v. Secretary of Public Wellfare]*, 758 F.2d [897, 919 (3d Cir. 1985)] (quoting *Hensley*, 461 U.S. at 440, 103 S.Ct. at 1943). The court also can deduct

> hours when the fee petition inadequately documents the hours claimed. *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939.

Id. (citations omitted). In determining whether the number of hours claimed is reasonable, the court may divide the claimed hours according to the type of work performed. *See, e.g., Maldonado v. Houstoun*, 2001 WL 720654 (3d Cir. 2001). Hours that would not typically be billed to a client cannot be billed to an adversary. *See Public Interest Research Group of N.J., Inc. v. Windall*, 51 F.3d 1179, 1188 (3d Cir. 1995).

The second step in the lodestar determination is determining whether the claimed rates are reasonable. The court starts with the market rates prevailing at the time of the petition, which the party seeking fees has the burden of establishing by satisfactory evidence. *See Maldonado*, 2001 WL 720654 at *3; *Lanni v. State of New Jersey*, 259 F.3d 146, 149 (3d. Cir. 2001). "[T]he court should assess the experience and skill of the [**10**] prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Rode*, 892 F.2d at 1183. If there is evidence that the market has established different rates for different categories of legal work, the district court should assign the appropriate rate to each category. *See Loughner v. University of Pittsburgh*, 2001 U.S.App.LEXIS 15992 (3d Cir. 2001).

Once the lodestar has been determined, the Court can adjust the lodestar downwards if the amount is not reasonable in light of the applicant's success - or more properly, his lack thereof - in the litigation. *Rode*, 892 F.2d at 1183. In certain rare instances, the lodestar may

also be adjusted upwards to compensate counsel for exceptionally high quality work or for the risks associated with undertaking the litigation. *Id.* at 1184. The party seeking an adjustment has the burden of proving that it is appropriate. *Lanni*, 259 F.3d at 149. "If that party meets the burden of proving that an adjustment is appropriate, the lodestar amount may be increased or decreased at the discretion of the District Court." *Id.*

In this case, lead counsel Richard C. Angino claims 179.9 hours for $89,950 in fees, and his associate James DeCinti claims 788.40 hours for $197,100, a total of $287,050 in attorney's fees. There was a Stock Purchase Agreement, which provides:

> 13.13 Attorney's Fees and Court Costs. If any action at law or equity is brought to enforce or interpret this Agreement, the prevailing party therein shall be entitled to recover from the other party the actual attorney's fees incurred, court costs, and other litigation-related expenses.

(Stock Purchase Agreement, Doc. 239, Ex. A.)

[11]There was also a Personal Guarantee, which provides:

> If any action at law or equity is brought to enforce or interpret this Agreement, the prevailing party therein shall be entitled to recover from the other party the actual attorney's fees incurred, court costs and all other litigation-related expenses

(Personal Guarantee, Doc. 239, Ex. B.)

Plaintiff's motion is supported by an affidavit of counsel Angino as to the hours spent and the rate charged. Angino admits that his fees are typically based

upon a percentage of the recovery obtained, but, that in complex litigation such as this action, he has often billed at an hourly rate of $1,000. (Angino Aff., Doc. 239, Ex. D at ¶ 4.) In this case, he charged $500 a hour, believing that to be a fair rate given the complexity, difficulty, and substantial risks involved in the instant action. (*Id.* at ¶ 5.) The hours total 179.9. (*Id.* at ¶ 7; *see also* Time Sheet Register, Doc, 239; Ex. F.) That totals $89,950 in fees. (Angino Aff., Doc. 239, Ex. D at ¶ 7.)

Plaintiff's motion is also supported by an affidavit of counsel DeCinti. DeCinti assisted Angino on this case, and is billed out at $250 an hour. (DeCinti Aff, Doc. 239, Ex. E at ¶¶ 3-4.) The hours total 788.40. (*Id.* at ¶ 6; *see also* Time Sheet Register, Doc. 239; Ex. F.) That comes to $197,100 in fees. (DeCinti Aff., Doc. 239, Ex. E at ¶ 6.) Defendant makes a number of objections to these figures: (1) they filed a motion for judgment after trial, or alternatively, for a new trial, and that until the Court decides on these motions, Plaintiff is not a "prevailing" party; (2) Defendant prevailed on Plaintiffs claims as filed and pursued in the action for tortious interference, fraud, and punitive damages; (3) Plaintiff originally agreed to attomey's fees based on a forty percent (40%) [12] contingency; (4) the agreement discusses "actual" costs, and Plaintiff has not paid the firm, so these are not "actual" costs; (5) much of the work claimed by Angino and DeCinti was for other advice and other litigation, such as an arbitration proceeding and previous state court lawsuits; (6) the $500 hourly rate that Angino is claiming is excessive and unreasonable, and out of line with the rate charged for similar cases in the community; and (7) the register does not reflect the actual expenses attributable to the prose-

cution of this action, since much of it is incident to this action, contains unexplained photocopying or fax charges that seem excessive, or includes expenses incurred before the federal action was even filed on February 11, 1998.

As a preliminary matter, Defendant's pending motion for judgment after trial, or alternatively, for a new trial, has been decided, and Plaintiff is a prevailing party. The Court is not concerned that the agreement discusses "actual costs." These are the actual costs that Plaintiff accrued in this action. It seems a waste of time to have Plaintiff pay his counsel, and then Defendant turn around and pay Plaintiff, when Defendant can simply pay Plaintiffs counsel and cut out the middle man. It does not make the fees any less "actual." Finally, Defendant's claim that much of the work was done prior to the action being commenced in federal court is meritless. I find that it is natural that Plaintiff would have incurred some expenses before the action could have been filed in preparation for drafting the complaint and such. All of the expenses were after he retained counsel, and Defendant has not illustrated that they were not in preparation of filing the lawsuit.

I have reviewed the briefs and I presided at the hearing. As a preliminary matter, [13] though it is within the discretion of the trial court to reduce the number of hours used to calculate the lodestar where an unreasonable number of attorneys are used at trial or elsewhere, *see Lanni*, 2001 U.S. App. LEXIS 16939, at *11-*12, using two (2) attorneys at trial was not unreasonable. Moreover, while Defendant argues that the hours seem excessive, it appears that the research and time spent was not unreasonable. Defendant has not pointed to anything that indicates that the number of hours that

counsel spent were unreasonable As Defendant has failed to carry his burden of establishing in his briefs or at the hearing that the number of hours expended was unreasonable, the lodestar will be calculated with the number of hours claimed in the fee petition.

With regard to the rates used in the lodestar calculation, Defendant's objections have merit. The general rule is that the market rates of the litigation forum apply. *Public Interest Group*, 51 F.3d 1179, 1186 (3d Cir. 1995). Defendant is correct that Angino's rate of $500/hour is excessive and unreasonable for this area. I find that the normal hourly rate in Scranton, Pennsylvania, is $150-$250 an hour. Taking Angino's thirty-six (36) years of experience into account, as well as the potentially difficult questions of law and the risk involved, I find that Angino is entitled to $300 an hour. With respect to DeCinti, taking into account his five (5) years of experience, I find that he is entitled to $200 an hour.

Multiplying the above reasonable hours and reasonable rates for each attomey, the following components of the lodestar result:

Angino: 179.9 hours x $300/hour = $ 53,970

DeCinti: 788.4 hours x $200/hour = $157,680

[14] Defendant correctly contends that the lodestar must be adjusted downwards to reflect the fact that Plaintiff had only limited success in the litigation, because Defendant prevailed on Plaintiff's claims as filed and pursued in the action for tortious interference, fraud, and punitive damages. However, it does not appear that Plaintiff has sufficiently accounted for their lack of success on these claims by not seeking attorneys' fees for any time spent on them. *See Loughner*, 2001 U.S. App. LEXIS 15992 at *10-*11 (the district court "should

reduce the hours claimed by the number of hours spent litigating claims on which the party did not succeed"). This is the proper way to handle unsuccessful claims that are "distinct in all respects" from the successful claims. *See Rode*, 892 F.2d at 1183; *Tumolo v. Triangle Pacific Corp.*, 1999 WL 672913 at *3 (E.D. Pa.) (though plaintiff succeeded on the merits, "a minimal reduction is warranted to reflect time spent litigating the unsuccessful theories and plaintiff's non-recovery of punitive or liquidated damages"); *Sampson v. Embassy Suites, Inc.*, 1998 WL 726649 at *4 (E.D. Pa. 1998) ("while the fee award need not be proportional to the damages recovered, a comparison of the amount requested and the amount obtained is an appropriate consideration.")

While Plaintiff received $225,000 in compensatory damages for his breach of contract claim, the jury found that Defendant did not fraudulently induce Plaintiff to enter into the Stock Purchase Agreement, and he received nothing on these claims. (See Jury Verdict Form, Doc. 232.) Therefore, though the Court is of the opinion that a lack of success on damages issues does not warrant as great a reduction as a lack of success on liability issues, the Court deems a small reduction appropriate. Accordingly, the Court will exercise its discretion to reduce the lodestar by fifteen percent (15%). *See* [15] *Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031, 1044 (3d Cir. 1996) (stating that district court has "broad discretion" to make a reduction for partial lack of success, and upholding a fifty percent (50%) reduction).

Angino: 179.9 hours x $300/hour
(reduced by 15%) = $ 45,674.5
DeCinti: 7884 hours x $200/hour
(reduced by 15%) = $134,028

Therefore, Plaintiff allowable counsel fees under the foregoing analysis would be $179,902.50.

However, I find that Plaintiff did not agree to representation by counsel at an hourly rate. In his Power of Attorney and Fee Agreement, paragraph two (2) states

> 2. I (we) agree to pay Angino & Rovner, P.C., any out-of- pocket expenses they incur to secure records, expert etc., plus a contingent fee that is totally dependent upon their obtaining monies for me (us) as follows ...
>
> (c) Settlement or verdict at trial, or arbitration, after trial, arbitration, or appeals or shortly before trial, and after this case has been totally prepared - 40%
> (d) **If no-fault recovery or non-monetary benefit** - RCA ($500); NJR ($450); others ($400) per hour but **not to exceed 40% of the total recovery** of value of benefit.

(Power of Attorney and Fee Agreement, Doc, 270, Ex A at ¶ 2(c)(d)) (emphasis added).

No subsection in paragraph two (2) is marked. However, this was a case where Plaintiff obtained a verdict at trial. Subsection (c) therefore applies, entitling counsel to forty percent (40%). Plaintiff contends that subsection (d) clearly provides for an hourly rate of $500 an hour. There are several problems with Plaintiff's position. First, this was clearly not a case of no-fault recovery or non-monetary recovery. More important, even if Plaintiff's hourly position is accepted, that is still capped at forty percent (40%) of the recovery.

[16] Plaintiff has not explained why his own fee agreement does not control in this case. The existence of

the Stock Purchase Agreement and Personal Guarantee does not entitle Plaintiff to other than the attorney's fees as he agreed upon; it merely provides that Plaintiff can collect his actual attorney's fees from Defendant. Therefore, Plaintiffs attorney's fees are limited to forty percent (40%) of the jury verdict. The jury awarded $225,000. Forty percent (40%) of that is $90,000. Accordingly, Plaintiff is entitled to $90,000 in attorney's fees.

2. Expenses

Plaintiff also seeks $69,470.87 in expenses. This claim is supported by a list of fax charges, receipts totaling $30,181 22, and photocopying, postage costs, long distance charges, and investigative expenses (including travel expenses) of $39,289.65 (Doc. 239, Exs. G, I.) Plaintiff also claims that he has incurred long distance phone charges of $1287. (Bernback Aff., Doc. 239, Ex. J.) At the hearing, he testified that he has incurred an additional $3277.75 in expenses since his petition, most preparing for this hearing.

Expenses are separate from attorney's fees. The Power of Attorney and Fee Agreement stated that Plaintiff will pay "out of pocket" expenses "plus a contingency fee." (Doc. 270, Ex. A.) Therefore, Plaintiff is not limited to the forty percent (40%) agreed in the Power of Attorney and Fee Agreement, as he was with the attorney's fees.

Defendant argues that the register does not reflect the actual expenses attributable to the prosecution of this action. Defendant maintains that many of the charges are incident to this action and that the calculations contain unexplained photocopying or fax charges that seem excessive, or include expenses incurred before [17] the federal action was even filed on February 11, 1998.

As discussed above, expense could have reasonably been incurred before the complaint was filed, and all of the alleged expenses were incurred after Plaintiff retained counsel. Defendant has not illustrated that such expenses were not related to this action.

Specifically, Defendant argues that the amounts payable to the American Arbitration Association are unrelated to this action. However, the Stock Purchase Agreement and Personal Guarantee states that if any action at law or equity is brought to enforce this Agreement, the prevailing party, viz Plaintiff, is entitled to recover both court costs and all other litigation-related expenses. (*See* Stack Purchase Agreement, Doc. 239, Ex A, Personal Guarantee, Doc 239, Ex B.) The Court recognizes that taking a case to arbitration is "litigation-related expenses" coming under the parties agreement Defendant has not illustrated that the payments to Robert May as an expert witness were not litigation-related expenses, and Plaintiff submits an affidavit that the expenses are related. (Hoerner Aff., Doc. 239, Ex. H.)

Defendant has also not singled out any other expenses which the Court can find are excessive in light of Plaintiff's affidavit concerning the postage and photocopying. The expenses as alleged in the fee petition will be awarded. Therefore, counsel will be awarded $69,470.87 in expenses, and Plaintiff will be awarded expenses of $4564.75.

CONCLUSION

In summary, Defendant will be ordered to pay the following sums to the following Plaintiff for the following expenses: $90,000 in attorney's fees, representing forty percent (40%) of the verdict; $69,470.87 in expenses to

Plaintiff's counsel: and $3277.75 for [18] expenses, for a total of $162,748.62.

An appropriate order follows.

s/May 20, 2002

s/A.R. Caputo
A. Richard Caputo
United States District Judge

[All repetition of sentences in this Memorandum and punctuation anomalies are faithfully reproduced here, as in the original.]

[19] * * * [caption omitted]

ORDER

NOW, this 20th day of May, 2002, **IT IS HEREBY ORDERED** that:

1. Defendant's motion for judgment after trial, or alternatively, for a new trial (Doc. 241) is **DENIED**.
2. Plaintiff's motion for attorney's fees from Defendant (Doc. 239) is **GRANTED IN PART AND DENIED IN PART**:
    A. Plaintiff is not entitled to an hourly rate.
    B. Defendant shall pay Plaintiff $90,000, representing the forty percent (40%) contingency fee agreed to by Plaintiff and counsel for representing Plaintiff in the instant action.
3. Plaintiff's motion for expenses from Defendant (Doc. 239) is **GRANTED**. Defendant shall pay Plaintiff's counsel $69,470.87 in expenses related to representing Plaintiff in the instant action.
4. Defendant shall pay Plaintiff $3277.75 for expenses incurred as a result of the instant action, pursuant to the Stock Purchase Agreement and Personal Guarantee.

s/A.R. Caputo
A. Richard Caputo
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No: 02-2742

MICHAEL L. BERNBACK
v.
*** THOMAS GRECO, individually and as President of Harvey's Lake Amphitheater, Inc.;**

Thomas Greco,
Appellant

*(Amended as per the Clerk's 9/5/02 Order)

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, Circuit Judges, and IRENAS,** District Judge.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges

** The Honorable Joseph E. Irenas, Senior United States District Judge for the District of New Jersey, who sat by designation, is limited to panel rehearing.

who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, [sic] is denied.

BY THE COURT,

/s/ D. Brooks Smith
Circuit Judge

Dated: **13 AUG 2003**